



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 30 CONSOLIDATED WITH NO. 31 OF 2018

ABUCHA LOTETUR.....1ST APPELLANT

KORIJE LOYIAWOI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 95 of 2018 by the Senior Resident Magistrate - Hon. J M Wekesa delivered on 12th September, 2018 at Kakuma)

JUDGMENT

1. The appellants **ABUCHA LOTETUR** and **KORIJE LOYIAWOI** were charged together with another with the offence of robbery with violence contrary to section 296(2) of the penal code the particulars of which were that on the 2nd day of March, 2018 at Kalobeyei village in Turkana West sub county within Turkana County, jointly robbed **LOPUTIRO ETABO** of his sheep valued at **Kshs.7,000/=** and at the time of such robbery used actual violence to the said **LOPUTIRO ETABO**.

2. They pleaded not guilty, were tried, convicted and sentenced to suffer death. Being dissatisfied with the said conviction and sentence, each filed respective appeals which were consolidated for purpose of determination and raised the following grounds:

- a) **Vital prosecution witnesses were not called**
- b) **Their identification was not proper as no identification parade was conducted.**
- c) **The prosecution case was not proved beyond reasonable doubt.**
- d) **Their defence was rejected without cogent reason**

3. When the appeals came up for hearing before me the appellants who were not represented filed individual written submissions which they ruled upon in which it was submitted that the case was a fabrication having initially been reported for stealing stock. It was further submitted that they were not properly identified by the complainant as the conditions prevailing were not suitable for positive identification. It was contended that the offence proved was assault and not robbery with violence. It was finally stated that their case at the lower court were irregularly consolidated as they had nothing in common. It was stated further that no recovery was made from them and neither was any exhibit produced in court to support the present case.

4. On behalf of the prosecution it was submitted by Mr. Mongare that all vital prosecution witnesses were called to testify and that there was no need for identification parade since the attack took place in broad day light without any difficulty in identifying the appellants and could recognize them by facial appearance. It was submitted that there was no requirement for recovery to be made so as to connect the appellant with the offence charged. It was further stated that the trial court was impartial and rejected the appellants defence lawfully.

5. This being a first appeal, this court is under legal duty to reevaluate the evidence tendered before the lower court and comes to its own conclusion though giving allowance that unlike the trial court did not have the advantage of seeing and hearing witnesses see **OKENO – V – R [1972] EA 32, 36**

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal Mruwala – V – R[1957] EA 570) it is not the function of a first appellate court to merely to scrutinize the evidence to see if there was some evidence to support the lower

courts findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See Peters V Sunday post [1958] EA 424"

6. The prosecution case was that on 2/3/2018 while PW1 LOPUTIRO ATABO was herding goats at Kokitela grazing fields the appellants attacked him with a club (rungu) on the ribs/waist and hand and took away his stock. He did not know the appellants before but was able to see their faces when they were assaulting him. When the appellants were arrested, he was called to the police station and was able to identify them. **PW2 APC JOSEPH LEKAKA** was on 5/3/2016 called by Sergeant Olemu with information that the 1st appellant had been arrested. He re-arrested the 1st appellant who gave the name of the 2nd appellant and the 3rd accused who was put on probation.

7. **PW3 S. SGT LAWRENCE OLEMU** received the complainant in his house when he went to report while his body was oozing blood. He organized a search for the stolen herd and managed to rescue his. When he was asked to give the description of the attackers he said one had a scar below the right eye. On 5/3/2018 the 1st appellant was arrested at Lonyanduk and he mentioned the name of the 2nd appellant as his accomplice and PW1 was able to identify them. **PW4 JOSEPH LORUPWANI** went to the scene and followed the foot prints of the attackers and the stolen sheep upto the tarmacked road, using the description of the attackers given by PW1. He was able to track the 1st appellant whom he took to the AP Post from where he was identified. During interrogation he gave the names of the 2nd appellant and the 3rd accused who was later brought to the police post by his father.

8. **PW5 Corp MARTIN LUCHELI** rearrested the appellant and investigated the matter and confirmed that the appellants who were armed with walking sticks assaulted PW1 while the 3rd accused took off with his herd. Under cross-examination he stated that the stolen sheep was a slaughtered and eaten by the appellants therefore nothing was recovered. **PW6 EMANUEL MUPALLA** produced P3 form on the complainant in which he classified injuries sustained as harm.

9. When put on their defence the 1st appellant stated that while herding his goats and sheep LORKWAM and other people went and beat him up without telling him what he had done. He was taken to Kakuma police station and later on charged in court with an offence he denied committing. The 2nd appellant stated that on 19/3/2018 at Noyala Ngitira while herding his goats two men went to him and asked him to tell them where their goats was and he said he had not seen it only to return with a motor vehicle and forced him to board the same and kept in police custody for two days before being produced in court.

10. From the record of appeal and the submissions herein and being a line to my role as first appeal court I have identified the following issues for determination:-

a) **Whether the appellants were adequately and properly identified.**

b) **Whether the prosecution case was proved to the required standard.**

11. On the issue of identification, it is clear from the record of proceedings that the appellant were convicted upon the evidence of a single identifying witness. The trial court was under duty to warn herself of the dangers of convicting based on a single identifying witness. In convicting the appellants she had this to say.

"I find the accused persons herein have been put squarely at the scene of crime which was a nearby water point that the complainant herein had taken his herd for a drink. The complainant bumped into three accused persons herein and the first accused who had a raw wound below his face was the first to mercilessly attack the complainant herein with a walking stick which he used to hit his head as the second accused hit him on his back with a walking stick too. The third accused was hiding in the bushes nearby and he later emerged and drove away a sheep. The second accused followed him as he ran away and continued beating him till he fell on the ground unconscious"

12. The issue for determination is whether the conditions prevailing was suitable for identification of the appellants herein based upon the standard set by the court of appeal in **WAMUNGA – V – R (1989) KLR 426 thus**

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstance of identification were favourable and free of possible error before it can safely make it the basis of conviction".

13. According to the evidence of PW1 the 1st and 2nd appellant suddenly attacked him; he did not know them before and only saw their faces. The only identification mark he gave of the 1st appellant was a scar. The question which the trial court did not answer is whether it was possible for the complainant to identify the attackers in the prevailing circumstances while it is on record that he fell down unconscious. This was confirmed by the evidence of PW3. The only mark as stated herein which he gave was that one of the attackers had a scar below the right eye and it is through that which led to the arrest of the first appellant but it was not a proved beyond reasonable doubt that it is only the 1st appellant who has a scar below the right eye thereby raising possibility of mistaken identity.

14. It is alleged that it is the 1st appellant who gave his names of the 2nd appellant and the 3rd accused as his accomplices but the circumstances under which he gave the said names have not been established. This was a case where the investigation officer ought to have conducted identification parade as set out in the case of **JOHN MWANGI KAMAU – V – R (2014) eKLR.**

15. There is further a gap in the prosecution case as to how the appellants were arrested and further there was no evidence tendered before the court to prove that indeed the said sheep was stolen with the only evidence available being that it was slaughtered and eaten by the appellant thereby raising a doubt as to whether the ingredients of the offence of robbery being stealing something capable of being stolen was proved.

16. I am therefore satisfied that there remains a doubt in the prosecution case as stated herein above the benefit of which should have been accorded to the appellants herein and therefore find and hold that their conviction was not safe.

17. The upshot of this therefore is that the appeal herein has merit and is hereby allowed and quash the conviction and set aside the sentence herein. The appellant should be set free forth with unless otherwise lawfully held and it is so ordered.

18. The state has a right of appeal.

Dated and delivered at Lodwar this 4th day of April, 2019

J WAKIAGA

JUDGE

In the presence of:-

Mongare for Respondent

Abucha Lotetur - 1st appellant

Korijie Loyiawoi - 2nd appellant

Richard - Court assistant